United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

75-2143

To be argued by
JOHN D. GORDAN, III

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2143

JAIME AVILES,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2143

JAIME AVILES,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jaime Aviles appeals from an order of the United States District Court for the Southern District of New York, filed October 21, 1975, by the Honorable Edmund L. Palmieri, United States District Judge, denying Aviles' petition under Title 28, United States Code, Section 2255 to vacate a judgment of conviction and sentence entered in the Southern District of New York on March 29, 1973, on Indictment 72 Cr. 115.

Indictment 72 Cr. 115, filed January 28, 1972, charged Aviles and a co-defendant in one count with unlawful distribution of heroin. Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A). On February 15, 1973, Aviles pleaded guilty to the indictment and admitted the specifications of a second felony offender information.

On March 29, 1973, Judge Palmieri sentenced Aviles to twelve years imprisonment and six years special parole.

On June 25, 1975, Aviles filed a petition under 28 U.S.C. § 2255 to set aside his conviction and sentence.* The petition was denied by order with opinion filed October 21, 1975. From that order this appeal is taken.

Statement of Facts

On February 15, 1973, accompanied by his present counsel, Jaime Aviles pleaded guilty to Indictment 72 Cr. 115. At the same time the Government filed a second felony offender information charging Aviles with having been convicted of a narcotics offense in 1962 in the United States District Court for the Eastern District of New York, and Aviles affirmed its allegations. At the outset of the proceedings Aviles executed a lengthy form acknowledging that he was aware of the rights there enumerated, that he realized that he was waiving them by pleading guilty and that he did so knowingly and voluntarily (25a-26a).** Judge Palmieri conducted a painstaking *voir dire* pursuant to Rule 11 of the Federal Rules of Criminal Procedure, eliciting Aviles' understanding of the nature of the charge and the consequences of the

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* Aviles had earlier, on November 8, 1974, filed a petition under Section 2255 seeking to set aside his sentence on grounds that the severity of his sentence violated a pre-pleading agreement he had made with a then Government informant and also resulted from serious misapprehensions by the District Court based in part on an inaccurate presentence report. 74 Civ. 4905 (S.D.N.Y.). The petition was denied by Judge Palmieri by order with opinion filed February 3, 1975. No appeal was taken.

** Page references followed by "a" refer to Aviles' appendix on appeal. The waiver of rights form is reproduced at the end of Judge Palmieri's opinion below.

plea.* During the *voir dire*, the following colloquy took place in connection with the penalties to which Aviles was subjecting himself by his plea:

> "The Court: And have you discussed with your lawyer, Mr. Rosenkranz, who is standing next to you, the possible penalty to which you are exposed by your plea of guilty in this case?
>
> The Defendant: Yes, sir.
>
> The Court: Will you state what that penalty is, please, Mr. Dougherty?
>
> Mr. Dougherty [the prosecutor]: Your Honor, I believe with the dangerous drug offender information the penalties are increased to a 25-year maximum. I believe that is section 849 of Title 26.
>
> The Court: Do you agree, Mr. Rosenkranz?
>
> Mr. Rosenkranz: Yes, sir.
>
> The Court: That he is exposed to a possible penalty of 25 years with the second offender information in the case?
>
> Mr. Rosenkranz: Yes, sir." (Tr. February 15, 1973, 72 Cr. 115, at 5).**

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* Since the proceeding below under 28 U.S.C. § 2255 was a collateral proceeding independent of the criminal action, the record in the criminal case is not part of the record on appeal before this Court. However, copies of the minutes of the guilty plea and sentence were annexed to Aviles' petition under Section 2255 and are thus in the record transmitted on appeal from the District Court.

** As Judge Palmieri noted in his opinion below denying the petition (2a, 4a, 20a-21a n. 3), the maximum period of imprisonment was incorrectly stated, apparently because the Special Attorney appearing for the Government believed that the information charging Aviles with his prior felony narcotics conviction in 1962 was laid under Section 849 of Title 21, United States Code, which provides for "dangerous special drug offender sentencing". This belief was entirely erroneous, for the infor-

[Footnote continued on following page]

There was no further discussion, beyond that quoted, with respect to possible penalties, and no mention was made of any mandatory term of special parole.

On March 29, 1973, Judge Palmieri sentenced Aviles to twelve years imprisonment to be followed by six years special parole. No suggestion was made by Aviles or his counsel that the special parole term came as a surprise. No appeal was taken.

On June 25, 1975, Aviles filed his present petition under Section 2255. Its only support was an affidavit of counsel which simply claimed that the failure of the Court to advise Aviles of the mandatory special parole term before accepting his guilty plea required that his conviction be summarily vacated without an evidentiary hearing and that he be allowed to plead anew. No claim was made by Aviles that he would not have entered his guilty plea had the trial judge advised him that he faced a mandatory special parole term, and indeed Aviles did not even suggest that he had been unaware at the time of the plea that a mandatory special parole term might be imposed.*

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mation contained none of the averments required by that section, complying rather with the provisions of Section 851(a)(1) of Title 21, as it should have. Since Aviles had pleaded guilty to a violation of Section 841(a)(1) involving a narcotic drug controlled substance, heroin, and had admitted his prior federal narcotics felony conviction, Aviles was liable to a sentence "to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, [illegible]oth . . . [and] a special parole term of at least 6 years in addition to such term of imprisonment." 21 U.S.C. § 841(b)(1)(A).

In his petition below Aviles made no claim concerning the misadvice he was given about the maximum term of imprisonment to which his plea of guilty subjected him, nor has he in this Court.

* Aviles' counsel's affidavit in support of the petition is reproduced in his appendix on appeal at 28a-30a.

At a brief conference held on Aviles' petition on October 10, 1975,* defense counsel conceded that his position was, as Judge Palmieri put it, " 'Judge, you took his plea and you did not say special parole. Therefore, the plea is invalid. Therefore, he has to re-plea[d].' " (October 10, 1975 Tr. 2). Defense counsel also again agreed that no evidentiary hearing was required. (*Id.* at 4).

On October 21, 1975, Judge Palmieri filed an opinion and order denying Aviles' petition.**

ARGUMENT

The District Court properly denied Aviles' petition to vacate his conviction and sentence pursuant to Title 28, United States Code, Section 2255.

Aviles' basic claim in this Court, as in the District Court, is simply put. The record of the taking of his guilty plea discloses that the District Judge did not advise him that the offense to which he was pleading guilty required, if Aviles were sentenced to a term of imprisonment, that a mandatory period of special parole also be imposed. Since this Court has held that in such circumstances Rule 11 of the Federal Rules of Criminal Procedure requires that a "defendant . . . be advised that . . . [a special parole term] will be imposed . . . [and] also be asked by the court if he understands that fact" before his guilty plea may be accepted, *Michel* v. *United States*, 507 F.2d 461, 463 (2d Cir. 1974), Aviles asserts that he is entitled to have his conviction and sentence vacated

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* Aviles has not included the transcript of the conference in his appendix. It is accordingly reprinted in full in an appendix at the end of the Government's brief.

** Judge Palmieri's opinion, which contains a detailed analysis of the facts and the applicable law, is set out in full in Aviles' appendix at 2a-27a.

under *McCarthy* v. *United States*, 394 U.S. 459 (1969), and to plead anew. *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975).*

We respectfully submit that the District Court properly denied the petition. Aviles' petition below, supported only by an affidavit of counsel, contained no assertion that Aviles had been unaware at the time of his guilty plea that he faced a statutorily mandated minimum term of special parole, nor did it claim that Aviles would have acted differently had Judge Palmieri mentioned the possibility of a mandatory special parole term before accepting Aviles' guilty plea. Moreover, the period of imprisonment and the term of special parole imposed were together substantially less than the maximum period of imprisonment which Judge Palmieri, before accepting the plea, advised Aviles that he was subjecting himself to by pleading guilty. Aviles is not entitled to relief under 28 U.S.C. § 2255 merely because the trial judge failed to advise him specifically that a mandatory period of special parole might be imposed.**

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* Perhaps recognizing the weakness of his position, Aviles adds in his brief (at 2) that "[i]t is undisputed that the petitioner had not been advised that as a consequence of his plea he would be subjected to an additional term of six years of special parole by either the Court or his counsel" and that his petition in the District Court claimed a "failure of both Court and counsel to advise petitioner that he would be subjected to a special parole (See, petition 28a-31a) . . ." While it is conceded that the Court did not advise Aviles that he faced special parole before accepting his guilty plea, the statements that it is "undisputed" that counsel did not do so either and that the petition so asserted are erroneous. The matter is discussed further *infra* at page 9, n.1.

** Aviles devotes a portion of his brief to the disappointment he purportedly experienced from the lack of fulfillment of his self-generated expectation that his sentence would not exceed that imposed on one Alfredo Medina. (Brief at 5-6). While Aviles taxes Judge Palmieri for not discussing this point in

[Footnote continued on following page]

The law is settled in this Circuit that a petition under Section 2255 may be denied without a hearing if it does not contain averments which, if true, would entitle the petitioner to relief under that section. *Dalli* v. *United States*, 491 F.2d 758, 760-761 (2d Cir. 1974). *See generally Taylor* v. *United States*, 487 F.2d 307 (2d Cir. 1973). The initial inquiry, we respectfully submit, must therefore be whether Aviles' concededly accurate claim—that, on the *voir dire* of his guilty plea, Judge Palmieri failed to mention special parole as part of the potential punishment to which Aviles was subjecting himself by pleading guilty—entitles Aviles to relief under Section 2255, absent any contention by Aviles that he was not otherwise aware of this fact.* The answer to this inquiry turns on the

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his opinion, the trial judge can hardly be faulted for not responding to an argument that Aviles never raised in his petition. Since, in addition, what may have happened to Medina in no way supports Aviles' legal claim, no response to his assertions now is warranted. Still less discussion is appropriate of Aviles' scurrilous attack on Judge Palmieri in Point II of his brief. Judge Palmieri's characterization of Aviles as "a serious violator of the narcotics laws who has had long experience with the criminal law" (18a) was, in view of Aviles' criminal record (27a), both accurate and charitable.

* For purposes of preliminary and, in our view, conclusive discussion, we limit ourselves to the absence of any claim below that Aviles was unaware of the mandatory special parole term prescribed by Section 841(b)(1)(A) of Title 21, United States Code. The absence of an averment tending to show prejudice—that Aviles was unaware of the mandatory special parole term and would have acted differently had he been informed of it by the Court—and the fact that the sentence imposed, including the special parole term, did not exceed what Judge Palmieri did advise Aviles of on the *voir dire* are also discussed but raise a separate issue requiring additional analysis. This issue need not be reached by the Court if, as we respectfully submit it should, the Court concludes that Aviles' failure to claim below that he did not know of the mandatory special parole term is dispositive of this appeal.

scope of relief under Section 2255 and the circumstances under which it is available. Briefly put, Aviles' petition was insufficient to entitle him to relief because the claim made below is not cognizable under Section 2255 and, in addition, is foreclosed by Aviles' failure to assert it on direct appeal.

A. Aviles' petition below failed to state a claim cognizable under 2 U.S.C. § 2255.

Although the precise boundaries of the claims cognizable under Section 2255 have been the subject of recent discussion in the Supreme Court, *Davis* v. *United States*, 417 U.S. 333 (1974), and this Court, *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974), the law has been clear in this Circuit since *United States* v. *Sobell*, 314 F.2d 314, 323 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963), that relief under Section 2255 is available only if the petitioner "has shown

> (1) a significant denial of a constitutional right, even though he could have raised the point on appeal and there was no sufficient reason for not doing so . . .; or
>
> (2) a defect seriously affecting his trial, even though not of constitutional magnitude, if it was not correctible on appeal or there were 'exceptional circumstances' excusing the failure to appeal . . ." (citations omitted).

See also United States v. *Coke*, 404 F.2d 836, 846-847 (2d Cir. 1968) (*en banc*); *United States* v. *Wright*, Dkt. No. 75-2001 (2d Cir., October 28, 1975), slip op. at 6385. *See generally Houser* v. *United States*, 508 F.2d 509 (8th Cir. 1974). Since *Sobell* the availability of collateral attack to federal prisoners to raise Fourth Amendment claims not made at trial or on direct appeal has been the subject

of considerable controversy, *compare Kaufman* v. *United States*, 394 U.S. 217 (1969) (Opinion of the Court) *with id.* at 242-243 (dissenting opinion of Mr. Justice Harlan and Mr. Justice Stewart), and *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 249 (1973) (concurring opinion of Mr. Justice Blackmun), 250 (concurring opinion of Mr. Justice Powell, the Chief Justice and Mr. Justice Rehnquist), and Judge Friendly's analysis in *Sobell* of the availability of relief under Section 2255 for non-constitutional claims has been amplified by the Supreme Court in *Davis* v. *United States*, *supra*, 417 U.S. at 346, which permits relief under Section 2255 for a non-constitutional claim only upon a showing of " 'a fundamental defect which inherently results in a complete miscarriage of justice' " and " 'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.' "

Aviles' petition below claimed no more than a failure to comply with Rule 11 arising from Judge Palmieri's oversight in not advising Aviles of the possibility of a mandatory special parole term before accepting his guilty plea.* Thus Aviles' argument is simply that since this

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* Aviles says in his brief (at 4):

> "Moreover, the Court below states, in its opinion, that counsel did not state in his affidavit that he did not inform *Aviles* of a special parole. It is clear from the transcript that counsel stated to the court that no mention of the conference special parole was made to *Aviles.*" (So in the original).

What this statement seems to be referring to is the following colloquy between Judge Palmieri and counsel at the brief conference on the motion on October 10, 1975. The trial judge asked counsel, who had represented Aviles on his plea and sentence:

> "The Court: * * * You also said you advised this man of the maximum punishment. What did you advise him of?
>
> Mr. Rosenkrantz: The only thing he was concerned with and the only thing I thought he was concerned with was the time he could face in prison and that's what I told him.

[Footnote continued on following page]

Court held in *Michel* that mandatory special parole is a possible consequence of a guilty plea which Rule 11 requires a defendant to be informed of by the District Court before such a plea may be accepted, *McCarthy* v. *United States*, *supra*, requires that he be allowed to plead anew on account of the District Court's failure in this case to so comply with Rule 11. Putting aside that doctrine announced by *Michel* was not clearly the law in this Circuit until nearly two years after the plea in this case, *but see Ferguson* v. *United States*, *supra*, and that *McCarthy* turned on inadequacies in the record with re-

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The Court: What did you tell him?

Mr. Rosenkrantz: Maximum, 25 years.

The Court: That's what he believed he was going to get?

Mr. Rosenkrantz: That's what he believed he could get." (October 10, 1975 Tr. 3).

This colloquy does not, as Aviles now claims, "conclusively demonstrate that counsel informed Judge Palmieri that he had not informed Aviles about a special parole." (Brief at 4). Not only is the statement of counsel relied on far more equivocal than Aviles now claims, *cf. Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974), it was not part of the petition, which contained no such claim, nor made under oath, *United States* v. *Welton*, 439 F.2d 824, 826 (2d Cir.), *cert. denied*, 404 U.S. 859 (1971), *cf. O'Neill* v. *United States*, 486 F.2d 1034, 1036 (2d Cir. 1973), 28 U.S.C. § 2242, and counsel went on to decline the Court's suggestion of an evidentiary hearing on the ground that in counsel's view the failure of the Court to advise Aviles of the possibility of a special parole term was conclusive on the merits of the petition. (October 10, 1975 Tr. 4). The most important point is, though, that the question is not what counsel may have told Aviles but what Aviles himself knew. While certainly what his counsel told him is one source of Aviles' knowledge, it is not the only one. Aviles' experience in narcotics law, exemplified by his multiple prior narcotics convictions (27a), suggests the possibility of other sources of information, as do other substantial factors not fully in the record and unnecessary to discuss here. Aviles' claim (Brief at 6) that the special parole term was "utterly unexpected" finds not one shred of support in the record.

spect to the factual basis for the plea, not the advice to McCarthy of the possible sentence, the principal point, ignored by Aviles' argument, is that the remedy of pleading anew announced in *McCarthy* for non-compliance with Rule 11 was specifically said to be provided under the Supreme Court's supervisory powers, 394 U.S. at 464, not on a constitutional or statutory basis, and was allowed in the context of a direct appeal from a judgment of conviction, not on post-conviction collateral attack under 28 U.S.C. § 2255. Nothing in *McCarthy* suggests that the same remedy is automatically available under Section 2255 or that *any* manner of non-compliance with Rule 11 may be sufficient grounds for relief under Section 2255.

While the Supreme Court has not directly qualified the *McCarthy* rule in a case brought under Section 2255, it long ago held in an analogous context that mere non-compliance with a Rule of Criminal Procedure, without more, was not a sufficient ground for relief on collateral attack. *Hill* v. *United States*, 368 U.S. 424 (1962). *Hill* involved the failure by the District Court to permit the defendant to speak on his own behalf prior to the imposition of sentence, as required by Rule 32(a) of the Federal Rules of Criminal Procedure. Although the Justices had earlier agreed, *Green* v. *United States*, 365 U.S. 301 (1961), that the right was an ancient and valuable one indisputably and mandatorily preserved by Rule 32(a)—indeed, one might suggest, at least as valuable as the right Aviles claims here, the Court noted in *Hill*, 368 U.S. at 428, in language it later repeated in *Davis* v. *United States*, *supra*:

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitu-

> tional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.' *Bowen* v. *Johnston*, 306 U.S. 19, 27. See *Escoe* v. *Zerbst*, 295 U.S. 490; *Johnson* v. *Zerbst*, 304 U.S. 458; *Walker* v. *Johnston*, 312 U.S. 275; *Waley* v. *Johnston*, 316 U.S. 101",

and, specifically contrasting the relief available under Section 2255 with what might have been the opposite outcome had the case been before it on direct appeal, 368 U.S. at 429 n.6, held:

> "Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." *Id.* at 429 (footnote 6 omitted).

Recent decisions of this Court in cases involving post-conviction collateral attacks for non-compliance with Rule 11 have not explicitly considered whether "automatic reversal" rule in *McCarthy* is fully applicable in proceedings under Section 2255; *E.g.*, *Michel* v. *United States*, *supra*; *Irizarry* v. *United States*, 508 F.2d 960, 968 (2d Cir. 1974); *Ferguson* v. *United States*, *supra*; *Rizzo* v. *United States*, 516 F.2d 789 (2d Cir. 1975).* However, that mere non-compliance with Rule 11 is not of itself a suf-

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* This can no doubt be explained by the Government's failure to raise the question.

ficient ground for collateral relief under Section 2255 was made clear in this Circuit in Judge Friendly's concurring opinion in *Manley* v. *United States*, 432 F.2d 1241, 1246, 1247 (2d Cir. 1970) (*en banc*). In other Circuits the distinction between the "automatic reversal" provided by *McCarthy* on direct appeal and the far more restricted availability of relief under Section 2255 for noncompliance with Rule 11 has been frequently emphasized. *United States* v. *Blair*, 470 F.2d 331, 340 n. 21 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); *Limon-Gonzalez* v. *United States*, 499 F.2d 936, 937-938 (5th Cir. 1974); *United States* v. *Maggio*, 514 F.2d 80, 87 (5th Cir. 1975), *cert. denied* — U.S. —, 44 U.S.L.W. 3358 (December 15, 1975); *United States* v. *Smith*, 440 F.2d 521, 527-529 (7th Cir. 1971) (Stevens, C.J., dissenting); *Arias* v. *United States*, 484 F.2d 577, 579 (7th Cir. 1973) (Stevens, C.J.), *cert. denied*, 418 U.S. 905 (1974); *Gates* v. *United States*, 515 F.2d 73, 76-77 (7th Cir. 1975); *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975);* *Sappington* v. *United States*, 523 F.2d 858, 860 (8th Cir. 1975) (Webster, C.J., concurring).

Given the absence of any claim by Aviles in his petition below that he was unaware at the time of his guilty plea that a mandatory special parole might be imposed, it is clear that he raised below no more than "a failure to comply with the formal requirements of the Rule", *Hill* v. *United States*, *supra*, 368 U.S. at 429, which does

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* The latter two cases seem to suggest that the limited scope of relief available under Section 2255 for Rule 11 violations was not clear until the Supreme Court's 1974 decision in *Davis* v. *United States*, *supra*. It is hard to understand this view since the Supreme Court had spoken clearly more than a decade earlier in *Hill* and since many courts appear to have understood, before *Davis*, that relief under Section 2255 was limited to claims of constitutional dimension. *United States ex rel. Soto* v. *United States*, 504 F.2d 1339, 1342 n.9 (3d Cir. 1974).

not entitle him to any relief under Section 2255, as the cases last cited in the paragraph above make abundantly clear if any question remained after *Hill* itself. *See also United States* v. *Wright, supra; compare United States ex rel. Roldan* v. *Follette*, 450 F.2d 514, 517 (2d Cir. 1971); *United States* v. *Welton, supra*, 439 F.2d at 826-827.* While Aviles argues that this Court's opinion in *Ferguson* v. *United States, supra*, is controlling and requires that his conviction be vacated, he overlooks the fact that *Ferguson* was decided in the context of a claim not only that the District Court had failed to comply with Rule 11 by advising Ferguson of a potential mandatory special parole term but also, as Judge Palmieri noted in his opinion below (6a), that Ferguson had been unaware of that fact and would not have pleaded guilty had he known.**

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* Such a conclusion does not denigrate the important principles underlying the rule announced in *McCarthy*, though we submit that those principles have greater force when the record inadequately reflects the factual basis for the plea, as in *McCarthy*, than they do in the present context. Rather, it merely tempers them with the realization that the importance of finality in criminal cases requires that a substantial deprivation of a defendant's rights occur before he can attack his conviction collaterally. On the other hand, to vacate Aviles' conviction because Judge Palmieri did not tell Aviles what Aviles does not claim he did not know would be a mockery of justice.

** The District Court felt obliged to address itself to this Court's summary reversal in *Brewington* v. *United States*, 515 F.2d 504 (2d Cir. 1975), and Aviles in his brief refers to the so-called *"Michel-Ferguson-Brewington"* trilogy (Brief at 4-5). The Government makes no reference to *Brewington* in its brief because it is beyond question that the summary reversal in *Brewington* lacks any precedential weight. Local Rule § 0.23 of the United States Court of Appeals for the Second Circuit; *United States* v. *Diggs*, 497 F.2d 391, 393 n.3 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974). *United States* v. *Joly*, 493 F.2d 672, 675-676 (2d Cir. 1974).

Although the foregoing is, we respectfully submit, a fully sufficient basis upon which to affirm the order below, there are additional deficiencies in Aviles' petition which warranted its summary denial. First, quite apart from his failure to claim that he was in fact unaware of the possibility of a mandatory special parole term, Aviles made no claim below that he would have acted any differently had Judge Palmieri advised him that he subjected himself by his guilty plea to a mandatory special parole term. *See Bye* v. *United States*, 435 F.2d 177, 179 n.5 (2d Cir. 1970).* But even that aside, since the sentence imposed on Aviles—twelve years imprisonment and six years special parole—was substantially less than the twenty-five years imprisonment of which he was warned by Judge Palmieri when he pleaded guilty, Aviles would be entitled to no relief under Section 2255 even if it had been claimed that Aviles was unaware of the possibility that a special parole term might be imposed and would not have pleaded guilty if he had known. *Bachner* v. *United States*, *supra*, 517 F.2d at 596-597; *Bell* v. *United States*, 521 F.2d 713 (4th Cir. 1975);** *Grant* v. *United States*, Dkt. No. 75-1306 (4th Cir., November 4, 1975); *McNamara* v. *United States*, Dkt. No. 75-2136 (4th Cir., November 4, 1975). *See also United States* v. *Woodhall*, 438 F.2d 1317, 1328-1329 (5th Cir.) (en banc), *cert. denied*, 403 U.S. 993 (1971). *But see United States* v. *Yazbeck*, Dkt. No. 75-1139 (1st Cir., October 31, 1975); *Roberts* v. *United States*, 491

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* *Bye*, as is obvious from a reading of *Michel* and *Ferguson*, is the progenitor of the rule announced in *Michel* that a defendant must be advised of the possibility of a special parole term before his guilty plea may be accepted. *Bye* involved the failure of the District Court to advise a defendant pleading guilty under the now repealed narcotics laws that he would be ineligible for probation or parole.

** As Judge Palmieri noted, *Bell* appears to have the precedential weight of an *in banc* opinion. 521 F.2d at 715 n.3.

F.2d 1236 (3d Cir. 1974); *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975); *United States* v. *Richardson*, 483 F.2d 516 (8th Cir. 1973).* There can simply have been no prejudice to Aviles—much less either an insufficiently voluntary and intelligent guilty plea or a "fundamental defect which inherently results in a complete miscarriage of justice" or "exceptional circumstances" requiring the availability of the writ under the Supreme Court's holdings in *Hill* and *Davis* — from a failure on Aviles' part to understand that special parole might be imposed, in view of the fact that the total period of imprisonment and special parole to which he was sentenced was seven years *less* than the period of imprisonment that Judge Palmieri warned Aviles he faced before accepting his guilty plea.

Although in *Bye* v. *United States*, *supra*, 435 F.2d at 180, this Court declined to give weight to the factor that the term of imprisonment actually imposed would require less time in jail, even absent the availability of parole, than would the maximum penalty of which Bye had been warned *with* the availability of parole Bye claimed to have assumed, *Bye* turned on the point that "[t]he danger is that the accused makes his decision to plead

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* Each of the last four cases cited vacated convictions and allowed repleading, on the authority of *McCarthy* v. *United States*, *supra*, in contexts in which it was felt that the record of the defendant's guilty plea did not adequately reflect that he had been advised and understood that he was facing a term of mandatory special parole. While each of these four cases arose on collateral attack, no consideration appears to have been explicitly given to the question whether the "automatic reversal" rule announced in *McCarthy* was applicable in proceedings under Section 2255, and in *Bachner* v. *United States*, *supra*, 517 F.2d at 597, the Seventh Circuit distinguished *Richardson* and *Roberts* on the ground that those cases had been decided without benefit of the Supreme Court's opinion in *Davis* v. *United States*, *supra*. Moreover, in none of these four opinions are the defendant's claims in his petition in the District Court discussed.

guilty underestimating by a factor of three the risk of prolonged mandatory incarceration." *Id.* However, it is not generally the law in this Circuit or elsewhere that misadvice of less significance as to the range of possible penalties requires repleading, absent any prejudice flowing from the sentence actually imposed, e.g. *United States* v. *Vermeulen*, 436 F.2d 72, 74 & n.1 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971), *United States* v. *Dorszynski*, 524 F.2d 190, 194 (7th Cir. 1975), *Eakes* v. *United States*, 391 F.2d 287, 288 (5th Cir. 1968), *United States* v. *Woodhall*, *supra*, 438 F.2d at 1328-1329, *Bell* v. *United States*, *supra*, *cf. Mordecai* v. *United States*, 421 F.2d 1133, 1139 (D.C. 1969), *cert. denied*, 397 U.S. 977 (1970), *but see United States* v. *Jasper*, 481 F.2d 976 (3d Cir. 1973), and the nature of the special parole term is quite different from the unavailability of parole under the now superseded narcotics laws under consideration in *Bye*:

> "Failure to advise a defendant of the mandatory parole term does not inherently result in a complete miscarriage of justice. Unlike ineligibility for parole, which 'automatically trebles the *mandatory* period of incarceration which an accused would receive under normal circumstances,' United States v. Smith, *supra*, 440 F.2d at 525 (emphasis in original), the mandatory parole term has no effect on that period of incarceration and does not ever become material unless the defendant violates the conditions of his parole. It would be as unrealistic, we think, to assume that he would expect to do so and be influenced by that expectation at the time he is considering whether to plead guilty, as it would be to assume that he would be influenced by other contingencies he is not advised about. For example, if he is released early by reason of earned good time, he will be deemed to be on parole until the end of the term of his

sentence and hence will be subject to being re-incarcerated if he violates parole conditions. 18 U.S.C. §§ 4161-4164. Good time he has earned while he is a prisoner may be forfeited if he commits an offense or violates a rule of the institution. 18 U.S.C. § 4165. Also, the date the defendant will be eligible for parole will depend on whether the judge leaves it to be governed by 18 U.S.C. § 4202; specifies an eligibility date before the expiration of one-third of the sentence, as permitted by 18 U.S.C. § 4208(a)(1); or specifies that the prisoner shall be eligible at such time as the board of parole may determine, as permitted by 18 U.S.C. § 4202; specifies an eligibility date before too remote from the considerations that may reasonably be expected to motivate a defendant's plea decision to be of legal significance."

Bachner v. *United States, supra*, 517 F.2d at 597.*

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* The differences suggested by *Bachner* between mandatory special parole under the new narcotics statute and the unavailability of parole under the old narcotics law raise a substantial question whether the holding by this Court in *Michel*, relying entirely on *Bye*, that a defendant must be advised of the possibility of mandatory special parole, was as clearly foreshadowed by *Bye* as this Court later suggested in *Ferguson* v. *United States, supra*. The suggestion by the Court in *Ferguson* that "the holding in *Michel* should have been equally obvious from our decision in *Jones* v. *United States*, 440 F.2d 466 (2d Cir. 1971), that a defendant must be informed of the maximum sentence he may receive", 513 F.2d at 1013, may also be respectfully questioned, since *Michel* sustained as sufficient advice to the defendant that "the Court must impose a minimum special parole term not less than three years", 507 F.2d at 463, despite the fact that there appears to be no limit in the statute to the period of special parole that may be imposed and the fact that Michel actually received five years special parole.

Bachner is particularly significant to the isssue raised here because Judge Hastings and Judge Stevens concurred in the opinion of the Court despite their earlier division in *United States* v. *Smith*, *supra*, 440 F.2d at 526-527, 532-533, in which Judge Hastings, writing for the Court, had declined, relying on *Bye*, to accept the argument that the failure to warn the defendant of his ineligibility for parole under the old narcotics laws could be excused on the ground that the sentence imposed, even without parole, was less than one-third of the maximum term of imprisonment of which the defendant had been warned.

We respectfully submit that *Bachner* and *Bell* are controlling in this case and that they sustain the denial of Aviles' petition below, even postulating that he was unaware that a mandatory special parole term was a possible consequence of his guilty plea and would not have so pleaded if he had been. Aviles' claim that this Court's decision in *Ferguson* v. *United States*, *supra*, is inconsistent with *Bell* and *Bachner* is entirely incorrect. In *Ferguson* the petitioner had claimed, as Aviles never has, that he was unaware of the mandatory special parole term and would not have pleaded guilty had he been aware of it. But of even greater significance to the inquiry here, Ferguson had pleaded guilty to two counts charging distribution of marijuana, for which he was liable on each count to five years imprisonment and at least two years mandatory special parole. 21 U.S.C. § 841(b)(1)(B). Although the trial judge advised Ferguson at the time of his plea that he was subject to five years imprisonment on each count, he failed to mention special parole and later sentenced Ferguson to five years imprisonment and five years special parole on the first count and to a *consecutive* term of imprisonment for one year and two years special parole on the second. Cumulating the years of imprisonment and special parole for purposes of weighing the impact of the failure to advise

Ferguson that he faced special parole, it may be seen that Ferguson, who was advised of no more than ten years imprisonment, was sentenced to a total of thirteen years imprisonment and special parole. This result, which was found impermissible in *Ferguson*, would not have passed muster under *Bell*, which holds that "when the prisoner's sentence and special parole term exceed the maximum sentence he was told he could receive . . . [p]ermission to withdraw the plea is then imperative." 521 F.2d at 715. Nor is it likely that the Seventh Circuit would decide the question differently than this Court did in *Ferguson*, given its decision in *Gates* v. *United States*, *supra*, written by Judge Hastings while *Bachner* was *sub judice* before him and two judges of a different panel of the Seventh Circuit. See also *Marvel* v. *United States*, 380 U.S. 262 (1965).* The point is simply that the question decided

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* The differences between the facts and the outcome in *Bachner* and *Bell*, on the one hand, and *Ferguson*, on the other, suggest a possible measure against which to determine whether a claim attacking a guilty plea is cognizable under Section 2255, at least when it is grounded in the trial court's failure to advise a defendant of the possibility of a mandatory special parole term before accepting his guilty plea. For constitutional purposes, a guilty plea is infirm only when it is not "intelligent" or "voluntary". *Brady* v. *United States*, 397 U.S. 742, 747 (1970); *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *McCarthy* v. *United States*, *supra*, 394 U.S. at 466. This Court noted in *Korenfeld* v. *United States*, 451 F.2d 770, 774 (2d Cir. 1971), *cert. denied*, 406 U.S. 975 (1972), in the context of the "no-parole" provision of the former narcotics laws: "But the mere fact that some defendants have pleaded guilty without knowing that they were ineligible for parole does not mean that they have done so involuntarily. *** The failure of the court to inform a defendant of his ineligibility for parole will only rarely affect the voluntariness of the plea of guilty. *United States* v. *Welton*, 439 F.2d at 826." Nor is a plea not "intelligent" for constitutional purposes if it is based on "ordinary error in either . . . [the defendant's] or his attorney's assessment of the law and the facts", *McMann* v. *Richardson*, 397 U.S. 759, 774 (1970), though a defendant may be entitled to relief on constitutional grounds

[Footnote continued on following page]

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if he "entered his plea in ignorance of what the maximum *possible* sentence was, believing it to be substantially less than that which the court was authorized to impose and which, indeed, it did impose." *United States ex rel. Leeson* v. *Damon*, 496 F.2d 718, 721 (2d Cir.), *cert. denied*, 419 U.S. 954 (1974) (emphasis in original). But beyond this, as earlier noted, the rule announced in *McCarthy* was not grounded on a constitutional or statutory basis, 394 U.S. at 464, and compliance with the prophylactic procedures of Rule 11 is not constitutionally mandated so long as the defendant's guilty plea is made under constitutionally sufficient circumstances. *Korenfeld* v. *United States*, *supra*, 451 F.2d at 773. *See also United States ex rel. Hill* v. *Ternullo*, 510 F.2d 844, 845 n. 1 (2d Cir. 1975); *Roddy* v. *Black*, 516 F.2d 1380, 1383 & n. 1 (6th Cir. 1975); *McChesney* v. *Henderson*, 482 F.2d 1101 (5th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). "[I]t is the rule and not the Constitution that requires the trial judge to give the defendant specific and accurate advice about the sentence which may be imposed after conviction." *Bachner* v. *United States*, *supra*, 517 F.2d at 599 (Stevens, C.J., concurring).

However, *Davis* and other cases recognize that federal prisoners may receive post-conviction relief under Section 2255 for deficiencies which do not rise to the level of a deprivation of constitutional rights. We do not suggest that *no* violation of Rule 11 is cognizable under Section 2255 unless it implicates the defendant's constitutional rights, but rather we respectfully submit that the claim must be of the gravity held necessary by *Davis* and *Hill*. In the context of this case and those like it, we believe that the potentially less strict standard for such a claim—which could not differ greatly from a constitutional one and still be characterized as "a complete miscarriage of justice"—is more than sufficiently met by cumulating the periods of imprisonment and special parole actually imposed and comparing them with what the defendant was informed of by the court. *Bell* and, inferentially, *Bachner* suggest that if the period of imprisonment of which the defendant was advised is less than the total of the periods of imprisonment and special parole actually fixed, the defendant may plead anew. However, this calculus confers a substantial benefit upon a defendant, for, whatever its restraints and contingent liabilities, special parole is simply not the same as imprisonment. This cumulation, we suggest, is more than sufficient to satisfy any lesser standard for "complete miscarriage[s] of justice" which do not rise to claims of constitutional dimensions but are cognizable on collateral attack under Section 2255.

in *Bachner* and *Bell* was not the question raised in *Ferguson*, and the issue here, even if supplemented by assumptions favorable to Aviles which are not in the pleadings below, is the one before the courts in *Bachner* and *Bell* and not before this Court in *Ferguson*. There is no reason to suppose that the *Ferguson* court would have decided the question raised here any differently from the *Bell* and *Bachner* courts.* It is an ancient principle in this Circuit that "while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity." *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944) (L. Hand, C.J.), *cert. denied*, 324 U.S. 867 (1945). Judge Hand's views are fully controlling here.**

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* Indeed, the following language from *Ferguson*, 513 F.2d at 1013,

> "We perceive little difference between a robbery defendant, sentenced to a ten-year prison term, who may during the last five years be released on parole, and the narcotics defendant subject to five years' imprisonment and five years' special parole. In each instance, a prisoner whose behavior is proper will serve only five years, and one whose behavior is less than adequate will serve ten. It would be anomalous indeed, if Rule 11 required the robbery defendant to be advised of a ten-year term, while the narcotics defendant had to be told only of the five year term",

strongly suggests that the *Ferguson* court would have reached the same conclusion as the *Bachner* and *Bell* courts had the facts of those cases been before it.

** Because it is clear that Aviles' claim cannot be properly characterized as constitutional, it is unnecessary to discuss the District Court's reliance on cases dealing with harmless constitutional error beyond noting that they support the result below *a fortiori*. As the foregoing discussion makes clear, where non-constitutional claims are involved, errors may be substantially more serious than "harmless" and still not be cognizable under Section 2255.

B. Aviles' failure to raise his present claim on direct appeal forecloses its assertion on a petition under 28 U.S.C. §2255.

Whether or not Aviles' averments below, even supplemented for argument's sake by assumptions that he did not in fact know that he faced a term of mandatory special parole and would not have pleaded guilty if he had, stated a claim cognizable under Section 2255, it is clear that his failure to make such a claim on direct appeal bars its assertion on collateral attack.

It is settled "that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 178 (1947). *Accord*, *Castellana* v. *United States*, 378 F.2d 231, 233 (2d Cir. 1967); *United States* v. *Gordon*, 433 F.2d 313, 314 (2d Cir. 1970); *Williams* v. *United States*, 334 F. Supp. 669, 671 (S.D.N.Y. 1971) (Weinfeld, J.), *aff'd*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972). Judge Friendly's opinion in *United States* v. *Sobell*, *supra*, 314 F.2d at 323, makes clear that a non-constitutional claim otherwise cognizable under Section 2255 is barred unless "it was not correctible on appeal or there were 'exceptional circumstances' excusing the failure to appeal." The narrow compass within which failure to raise a non-constitutional claim on direct appeal may be excused is made clear by *United States* v. *Travers*, *supra*, 514 F.2d at 1176-1177, in which this Court, relying on *Sunal* v. *Large*, *supra*, said that, where non-constitutional claims are involved, "collateral relief will rarely be accorded to those who, even for apparently good reasons, did not exhaust the possibilities of direct review", even when the judicial decisions which made direct appeal seem futile were overruled only long after the time for direct appeal had expired and even though a grant of relief under Section 2255 would have resulted not in a new trial but rather in

dismissal of the charges. *See also United States* v. *Wright, supra*, slip op. at 6385; *United States* v. *Gordon, supra*. *Cf. Seiller* v. *United States*, Dkt. No. 75-2002 (2d Cir., December 1, 1975), slip op. at 6522 n.9. Indeed, while Judge Friendly's opinion in *Sobell* suggests a considerably more liberal standard for the availability of relief under Section 2255 for constitutional violations which might have been raised on direct appeal but were not, more recent authority in this Circuit, *United States* v. *West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974), *Williams* v. *United States*, *supra*, 463 F.2d at 1184-1185, and in the Supreme Court, *Kaufman* v. *United States*, *supra*, 394 U.S. at 227 n.8, *see also Davis* v. *United States*, 411 U.S. 233, 239-242 (1973), establish that the restrictions on the assertion under Section 2255 of even constitutional claims that might have been raised on direct appeal are nearly as stringent as for non-constitutional ones.

In this case there is every reason to reject Aviles' claim as foreclosed by his failure to raise it at the time of his sentence and on direct appeal. If Aviles was in fact surprised by the imposition of a term of special parole, he was certainly fully aware of all the necessary circumstances to make his present claim the moment that Judge Palmieri pronounced sentence. Not only was no complaint made at the sentencing nor any appeal taken, but Aviles' first petition under § 2255, as he concedes, made no mention of the point. No sufficient justification or explanation has been made, or could be, for Aviles' failure to raise on direct appeal the claim now made. That such an appeal might have been taken was obvious enough from *McCarthy*, which was decided nearly four years before the plea in this case was accepted. While Aviles asserts in his brief (at 6)—again without a shred of support in the record—that he "was bereft of legal remedy at the time he was sentenced and counsel so advised him", this Court held in *Ferguson* that the deci-

sion in *Michel* was more than adequately foreshadowed in *Bye* v. *United States*, *supra*, and *Jones* v. *United States*, *supra*, both decided more than two years before Aviles pleaded guilty here.* And even if *Michel* had not only not been predictable but the law at the time had also been settled to the contrary, Aviles' faliure to take a direct appeal would foreclose his present claim. *Sunal* v. *Large*, *supra*; *United States* v. *Travers*, *supra*; *Williams* v. *United States*, *supra*, 463 F.2d at 1184-1185; *United States* v. *Sobell*, *supra*, 314 F.2d at 324.

The reasons for this rule are obvious and require little elaboration beyond what Judge Friendly said in *United States* v. *Sobell*, *supra*, 314 F.2d at 324-325, in response to a somewhat more meritorious claim than Aviles':

> "We think it important to emphasize, as did the Supreme Court in Sunal v. Large, the policy considerations underlying what may seem to some a hoary and technical rule—'that the writ of *habeas corpus* will not be allowed to do service for an appeal.' 332 U.S. at 178, 67 S.Ct. at 1590. The problem, as Mr. Justice Douglas there said, 'has radiations far beyond the present cases.' 332 U.S. at 181, 67 S.Ct. at 1592. There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new

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* Earlier in this brief, at p. 18, n.1, we have respectfully suggested that the decision in *Michel* was not as foreseeable from *Bye* and *Jones* as *Ferguson* held. However, *Ferguson* stands as the law in this Circuit, and if *Michel* was not sufficiently "novel" to permit its prospective application, as *Ferguson* held, then it was sufficiently predictable at the time of the plea for Aviles to have taken a direct appeal. But if it were concluded that *Ferguson* did not correctly assess the "novelty" of *Michel*, then *Michel's* holding would properly be prospective, and Aviles' claim now would be foreclosed on the merits.

trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause 'litigation in these criminal cases [to] be interminable' 332 U.S. at 182, 67 S.Ct. at 1593, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. If the point on which Sobell now relies had been raised and sustained on appeal, that would on no account have led to a direction for acquittal. Even under all the elaborate safeguards with which this country properly surrounds those charged with crime, it would have led only to a new trial, in which it seems unlikely that the result as to any of the defendants would have differed. When a claim is raised upon direct appeal as this could have been, and is there sustained, a new trial can be had seasonably, when witnesses are still available and their recollections still fresh. In contrast, collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend he is entitled to that relief from the courts. When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws. All

this is the wisdom behind the doctrine that limits collateral attack on criminal judgment. See Fuld, J., in People v. Howard, 12 N.Y. 2d 65, 236 N.Y.S. 2d 39, 187 N.E. 2d 113 (1962)."

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN D. GORDAN, III,
Assistant United States Attorney,
Of Counsel.

APPENDIX

Minutes of Hearing of October 10, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 3094

JAIME AVILES,

Plaintiff,

—VS.—

UNITED STATES OF AMERICA,

Defendant.

October 10, 1975
3:30 P.M.

BEFORE: HON. EDMUND P. PALMIERI,
District Judge.

APPEARANCES:

PAUL J. CURRAN, ESQ.
United States Attorney
By: STEVEN FRANKEL, ESQ., of Counsel

RICHARD ROSENKRANTZ, ESQ.
Attorney for Petitioner

(2) The Court: Gentlemen, I asked you to appear today because I wanted to clear the atmosphere a little bit.

I realize that you made the motion late in August and that the family of this man is importuning you for a quick decision and so forth, and I want to assure you that the matter has not escaped my attention at all. I was away on vacation until the 8th of September and this matter has been very much on my mind ever since.

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The law is not entirely clear. There appears to be a conflict among the Circuits on this point, and I am in the process of laboring with an opinion. I am very close to a decision. I hope that before ten days are out, I will file my opinion.

Now, that being said, I was also concerned about another aspect of the matter and that has to do with whether or not I should conduct an evidentiary hearing.

In effect, you say, "Judge, you took his plea and you did not say special parole. Therefore, the plea is invalid. Therefore, he has to re-plea."

That is substantially what your position is, isn't it?

Mr. Rosenkrantz: Yes.

The Court: You remember the colloquy we had at (3) the bench as to whether you agreed that was the maximum punishment. You said you did. The U.S. Attorney said 25 years, you said 25 years, and I accepted it. I did not think you two distinguished men could be wrong, but, apparently, anybody could be wrong.

You also said that you advised this man of the maximum punishment.

What did you advise him?

Mr. Rosenkrantz: The only thing he was concerned with and the only thing I thought he was concerned with was the time he could face in prison and that's what I told him.

The Court: What did you tell him?

Mr. Rosenkrantz: Maximum, 25 years.

The Court: That's what he believed he was going to get?

Mr. Rosenkrantz: That's what he believed he could get.

The Court: That is the maximum he thought he could get. So he ends up by getting twelve plus six, which we know is a lot less that twenty-five.

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So, really, the essence of your complaint is that twelve plus six, even though it is less than twenty-five, does not conform with the statute because the statute requires me to utter those words. I did not utter them; (4) therefore, the plea is invalid.

Isn't that the essence and guts of your motion?

Mr. Rosenkrantz: Based on the Ferguson decision, which is a similar decision.

The Court: Then there is no point in my having an evidentiary hearing.

Do you agree with that?

Mr. Rosenkrantz: Yes.

The Court: There would be no purpose in my having it. I think it is a narrow and clear-cut question of the law.

Mr. Rosenkrantz: The motion was made in June and returned on the 1st day of July.

The Court: Here is a reply affidavit filed by you on August 22, 1975.

Mr. Rosenkrantz: That's a reply to the Government's answer.

The Court: This motion was not fully submitted before me until the latter part of August.

Do you agree to that?

Mr. Rosenkrantz: Yes, your Honor.

The Court: All right, that clears it. As long as I can feel that I did the best I could, I did not want to give you the impression or even the unfortunate family of (5) this defendant the impression that I was just sitting on these papers.

I have been put through an obstacle course, so to speak. The motion has forced me to do a lot of work. I am not complaining. It is a thorny question. I am going to do the best I can and then the powers that control my decision will have to decide what I have to do.

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Mr. Rosenkrantz: With all due deference, your Honor states there is a conflict in the——

The Court: I prefer to have you anticipate my "learned" opinion.

Mr. Rosenkrantz: I don't think there is any conflict in this Circuit.

The Court: This Circuit stands clear and loud, but, in my opinion, alone. It is a clear conflict, and I will elucidate that statement very shortly. I am delighted you are interested and curious.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOHN D. GORDAN, III, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the **29th** day of **December, 1975,** he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

RICHARD I. ROSENKRANZ, Esq.

66 Court Street

Brooklyn, New York 11201

And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this
29th day of **December 1975.**

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977